

### **REMARKS**

This is a full and timely response to the outstanding non-final Office Action mailed October 14, 2004. Through this response, independent claims 1, 18, and 34 have been amended, and claims 16, 31, and 35 have been canceled. Reconsideration and allowance of the application and pending claims 1-15, 17-30, and 32-34, 36-47 are respectfully requested.

#### **I. Claim Rejections - 35 U.S.C. § 102(b)**

##### **A. Statement of the Rejection**

Claims 1-3, 10, 15-18, 24, 31-34, 36-42 and 47 have been rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by *Cottom* ("Cottom," U.S. Pat. No. 650,824). Applicant respectfully traverses this rejection.

##### **B. Discussion of the Rejection**

It is axiomatic that "[a]nticipation requires the disclosure in a single prior art reference of each element of the claim under consideration." *W. L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1554, 220 U.S.P.Q. 303, 313 (Fed. Cir. 1983)(emphasis added). Therefore, every claimed feature of the claimed invention must be represented in the applied reference to constitute a proper rejection under 35 U.S.C. § 102(b).

#### **Independent Claim 1**

As recited in independent claim 1, Applicant claims (with emphasis added):

1. A masonry unit for use in mortared wall structures, said unit comprising:  
a first surface; and  
***a mortar buffer*** that at least partially surrounds the first surface, ***wherein the mortar buffer is configured receive and retain mortar.***

Applicant respectfully submits that *Cottom* does not disclose at least the emphasized claim features. In particular, nothing in the specification or figures of *Cottom* discloses a **mortar buffer**, **wherein the mortar buffer is configured to receive and retain mortar**, as recited in independent claim 1.

Because independent claim 1 is allowable over *Cottom*, dependent claims 2-15 and 17 are allowable as a matter of law for at least the reason that the dependent claims 2-15 and 17 contain all elements of their respective base claim. See, e.g., *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

### **Independent Claim 18**

As recited in independent claim 18, Applicant claims (with emphasis added):

18. A masonry unit for use in mortared wall structures, said unit comprising:
  - a front surface;
  - a back surface opposing the front surface;
  - a top surface;
  - a bottom surface opposing the top surface;
  - a first side surface;
  - a second side surface opposing the first side surface; and
  - a mortar buffer that at least partially surrounds the front surface and joins the front surface with the top surface, the bottom surface, and the first and the second side surfaces along a substantially constant angle of inclination between the front surface and each of the top surface, the bottom surface, and the first and the second side surfaces, **wherein the mortar buffer is configured to receive and retain mortar**.

Applicant respectfully submits that *Cottom* does not disclose at least the emphasized claim features. In particular, nothing in the specification or figures of *Cottom* discloses a **mortar buffer**, **wherein the mortar buffer is configured retain mortar**, as recited in independent claim 18.

Because independent claim 18 is allowable over *Cottom*, dependent claims 19-30 and 32-33 are allowable as a matter of law.

### Independent Claim 34

As recited in independent claim 34, Applicant claims (with emphasis added):

34. A wall of masonry units, comprising:

a first masonry unit having a first surface at least partially surrounded by a first mortar buffer;

a second masonry unit having a second surface substantially parallel to the first surface of the first masonry unit, wherein the second surface is at least partially surrounded by a second mortar buffer; and

mortar disposed between the first and the second masonry units *and disposed on the first and the second mortar buffers*.

Applicant respectfully submits that *Cottom* does not disclose at least the emphasized claim features. In particular, nothing in the specification or figures of *Cottom* discloses *mortar disposed between the first and the second masonry units and disposed on the first and the second mortar buffers*, as recited in independent claim 34.

Because independent claim 34 is allowable over *Cottom*, dependent claims 36-47 are allowable as a matter of law.

Due to the shortcomings of the *Cottom* reference described in the foregoing, Applicant respectfully asserts that *Cottom* does not anticipate Applicant's claims. Therefore, Applicant respectfully requests that the rejection of these claims be withdrawn.

## **II. Claim Rejections - 35 U.S.C. § 102(b)**

### **A. Statement of the Rejection**

Claims 1-3, 9, 10, 15-18, 24 and 30-33 have been rejected under 35 U.S.C. § 102(a) as allegedly being anticipated by *Schrader et al.* (“*Schrader*,” U.S. Pat. No. D457,971). Applicant respectfully traverses this rejection.

### **B. Discussion of the Rejection**

It is axiomatic that “[a]nticipation requires the disclosure in a single prior art reference of each element of the claim under consideration.” *W. L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1554, 220 U.S.P.Q. 303, 313 (Fed. Cir. 1983)(emphasis added). Therefore, every claimed feature of the claimed invention must be represented in the applied reference to constitute a proper rejection under 35 U.S.C. § 102(a).

#### **Independent Claim 1**

Applicant respectfully submits that nothing in the specification or figures of *Schrader* discloses a ***mortar buffer, wherein the mortar buffer is configured to receive and retain mortar***, as recited in independent claim 1.

Because independent claim 1 is allowable over *Schrader*, dependent claims 2-15 and 17 are allowable as a matter of law.

#### **Independent Claim 18**

Applicant respectfully submits that nothing in the specification or figures of *Schrader* discloses a ***mortar buffer, wherein the mortar buffer is configured to receive and retain mortar***, as recited in independent claim 18.

Because independent claim 18 is allowable over *Schrader*, dependent claims 19-30 and 32-33 are allowable as a matter of law.

#### **Independent Claim 34**

Applicant respectfully submits that nothing in the specification or figures of *Schrader* discloses *mortar disposed between the first and the second masonry units and disposed on the first and the second mortar buffers*, as recited in independent claim 34.

Because independent claim 34 is allowable over *Schrader*, dependent claims 36-47 are allowable as a matter of law.

Due to the shortcomings of the *Schrader* reference described in the foregoing, Applicant respectfully asserts that *Schrader* does not anticipate Applicant's claims. Therefore, Applicant respectfully requests that the rejection of these claims be withdrawn.

### **III. Claim Rejections - 35 U.S.C. § 103(a)**

#### **A. Rejection of Claims**

Claims 4-8, 11-14, 19-23, 25-29 and 43-46 have been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Cottom*. Claims 4-8, 11-14, 19-23, 25-29 and 34-47 have been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Schrader*. Claim 35 has been rejected under 35 U.S.C. 102(b) as allegedly anticipated by or, in the alternative, under 35 U.S.C. 103(a) as allegedly obvious over *Cottom*. Applicant respectfully traverses these rejections.

#### **B. Discussion of the Rejection**

As has been acknowledged by the Court of Appeals for the Federal Circuit, the U.S. Patent and Trademark Office ("USPTO") has the burden under section 103 to establish a proper case of

obviousness by showing some objective teaching in the prior art or generally available knowledge of one of ordinary skill in the art that would lead that individual to the claimed invention. See *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988). Accordingly, to make a proper case for obviousness, there must be a prior art teaching or established knowledge that would suggest to a person having ordinary skill in the pertinent art to fill the voids apparent in the applied reference. It is respectfully asserted that no such case has been made in the outstanding Office Action.

**Claims 4-8, 11-14, 19-23, 25-29 and 43-46 (*Cottom*)**

Page 3, section 7 of the Office Action provides as follows:

Cotton[sic] provides each of the elements of these claims except for the angle of inclination of the beveled surfaces, the width of the beveled surfaces and surface finishes of ground, polished, rough or shiny.

The angle and width of the beveled surfaces would have been a choice of design which would have been obvious at the time of the invention to one having ordinary skill in the art. One of ordinary skill in the art would have chosen an angle and width to meet a desired aesthetic.

Finished block surfaces or ground, polished, rough and shiny are all well known in the building block/brick art and each would have been a choice of design which would have been obvious at the time of the invention to one having ordinary skill in the art as Cotton[sic] suggests at line 47 that the blocks may be given any desirable ornamental surface.

As acknowledged by the Office Action, *Cottom* does not anticipate claims 4-8, 11-14, 19-23, 25-29 and 43-46. However, Applicant respectfully disagrees that the angle and width of the beveled surfaces would have been “a choice of design which would have been obvious.” For example, the angle and/or width provide functional significance in facilitating mortar application, thereby reducing the likelihood of spillage on the surfaces of the masonry unit. Because there is functional significance to the angle and/or width, it is incorrect to say such configurations are a mere design choice. Thus, Applicant respectfully requests that the rejection be withdrawn.

Applicant also traverses the finding that the use of “[F]inished block surfaces or ground, polished, rough and shiny... would have been a choice of design,” since shiny surfaces provide an indication of the reflectivity of a surface, which does has functional significance. Thus, Applicant respectfully requests that the rejection be withdrawn.

Additionally, the Office Action states that “[F]inished block surfaces or ground, polished, rough and shiny are all well known the surfaces.” Applicant respectfully traverse this finding of well-known art and submit that the subject matter noted above should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support the conclusions, as required. The Manual of Patent Examining Procedure (MPEP) defines the standard for taking official notice. As provided in MPEP § 2144.03:

Official notice without documentary evidence to support an examiner’s conclusion is permissible only in some circumstances. While “official notice” may be relied on, these circumstances should be rare when an application is under final rejection or action under 37 CFR 1.113. Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known. As noted by the court in *In re Ahlert*, 424, F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), the notice of facts beyond the record which may be taken by the examiner must be “capable of such instant and unquestionable demonstration as to defy dispute” (citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961)).

As provided in MPEP § 2144.03 (emphasis added):

If applicant adequately traverses the examiner’s assertion of official notice, *the examiner must provide documentary evidence in the next Office action* if the rejection is to be maintained. See 37 CFR 1.104(c)(2).

For example, shiny surfaces as used on masonry units are not known so as to be capable of instant and unquestionable demonstration, and in fact, there is no suggestion or teaching in *Cottom* that a masonry unit can be configured with a shiny surface. *Cottom* teaches ornamental stone appearances, which is contrary to teachings of a masonry unit having a shiny surface and, in particular, clearly would not be consistent with maintaining an ornamental design having a stone appearance. Accordingly, Applicant traverses the Examiner's use of official notice. Because of this traversal, the Examiner must support his finding with evidence, or withdraw the official notice determination.

**Claims 4-8, 11-14, 19-23, 25-29 and 43-46 (*Schrader*)**

Pages 3-4, section 8 of the Office Action provides as follows:

Schrader provides each of the elements of these claims except for the angle of inclination of the beveled surfaces, the width of the beveled surfaces and surface finishes of ground, polished, rough or shiny.

The angle and width of the beveled surfaces would have been a choice of design which would have been obvious at the time of the invention to one having ordinary skill in the art. One of ordinary skill in the art would have chosen an angle and width to meet a desired aesthetic.

Finished block surfaces or ground, polished, rough and shiny are all well known in the building block/brick art and each would have been a choice of design which would have been obvious at the time of the invention to one having ordinary skill in the art such that the blocks may be given any desirable ornamental surface.

Schrader further fails to provide a wall of blocks with mortar of the beveled surfaces. The examiner takes Official Notice that it is well known in the masonry arts to grout the joint between adjacent blocks or bricks when building a wall. It would have been obvious at the time of the invention to one having ordinary skill in the art that the blocks of Schrader could have been used to build a wall and further to grout the joints between adjacent blocks.

Initially, Applicant respectfully submits that *Schrader* does not disclose the elements of claim 34, and thus also does not disclose the elements of the corresponding dependent claims 35-47. Also, as acknowledged by the Office Action, *Schrader* does not provide for the angle of inclination of the



beveled surfaces, the width of the beveled surfaces and surface finishes of ground, polished, rough or shiny (claims 4-8, 11-14, 19-23, 25-29 and 43-46). However, Applicant respectfully disagrees that the angle and width of the beveled surfaces would have been “a choice of design which would have been obvious,” or that the surface features were obvious. In particular, Applicant respectfully submits that there is no basis in *Schrader* as to make this conclusion of obviousness, and thus a prima facie case of obviousness has not been made. *Schrader* is a design patent and expectedly makes no mention of a mortar buffer, nor with its lack of corresponding description, does it provide a purpose for the bevel or even an application for a barrier block in general. Since it is unclear what kind of purpose is being accomplished by the overall design or specific features of the barrier block, Applicant respectfully requests that the rejection be withdrawn or that the next Office Action provide further information to support its basis for obviousness.

Applicant respectfully disagrees that the angle and width of the beveled surfaces would have been “a choice of design which would have been obvious.” For example, the angle and/or width provide functional significance in facilitating mortar application, thereby reducing the likelihood of spillage on the surfaces of the masonry unit. Because there is functional significance to the angle and/or width, it is incorrect to say such configurations are a mere design choice. Thus, Applicant respectfully requests that the rejection be withdrawn.

Applicant also traverses the finding that the use of “[F]inished block surfaces or ground, polished, rough and shiny... would have been a choice of design,” since shiny surfaces provide an indication of the reflectivity of a surface, which does have functional significance. Thus, Applicant respectfully requests that the rejection be withdrawn.

Additionally, the Office Action states that “[F]inished block surfaces or ground, polished, rough and shiny are all well known the surfaces.” Applicant respectfully traverses this finding of

well-known art and submit that the subject matter noted above should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support the conclusions, as required. For example, shiny surfaces as used on masonry units are not known so as to be capable of instant and unquestionable demonstration, and in fact, there is no suggestion or teaching in *Schrader* that a masonry unit can be configured with a shiny surface. *Schrader* teaches barrier blocks in a design patent, with no support as to its use or function. Accordingly, Applicant traverses the Examiner's use of official notice. Because of this traversal, the Examiner must support his finding with evidence, or withdraw the official notice determination.

In the instant case, Applicant respectfully submits that the statement that it is "well known in the masonry arts to grout the joint between adjacent blocks or bricks when building a wall" is not known so as to be capable of instant and unquestionable demonstration. Thus, Applicant respectfully traverse this finding of Official Notice and submit that the subject matter noted above should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support the conclusions, as required. In particular, there is no suggestion or teaching in *Schrader* that a wall can be constructed out of barrier blocks. Even assuming that a wall could be constructed out of barrier blocks, the design shown in *Schrader* would appear to suggest that no mortar would be needed. For example, the recessed structures shown in FIG. 3 would suggest that, if these blocks could be stacked together, they would presumably be stacked without any need for mortar. Accordingly, Applicant traverses the Examiner's use of official notice. Because of this traversal, the Examiner must support his finding with evidence, or withdraw the official notice determination.

**Claim 35**

Page 4, section 9 of the Office Action provides as follows:

It is the examiner's position that some cement (3) will inherently flow onto the beveled surfaces however if one wishes to argue then the examiner takes Official Notice that it is well known in the masonry arts to grout the joint between adjacent blocks or bricks when building a wall. It would have been obvious at the time of the invention to one having ordinary skill in the [sic] to grout the joints between adjacent blocks of Cotton[sic] for improved aesthetics and strength of the wall.

Applicant respectfully disagrees. Since the limitations of claim 35 have been incorporated into canceled claim 34, the following is addressed in the context of claim 34 with the claim 35 limitation. Nothing in *Cottom* would disclose, teach, or suggest that mortar is disposed on the bevel. In fact, given the wide bevel shown in *Cottom*, having mortar on such a wide bevel would detract from the stone appearance, and thus having mortar on the bevel in *Cottom* is contrary to what is taught in *Cottom*. Accordingly, it is not obvious to have mortar on the bevel in a wall structure.

Additionally, Applicant respectfully traverse this finding of Official Notice and submit that the subject matter noted above should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support the conclusions, as required. Although it appears from the figures that the joints in *Cottom* are grouted, it is not shown or suggested that the bevel is grouted, and as explained above, grouting the bevel is both undesirable and thus not obvious.

In summary, it is Applicant's position that a proper case for obviousness (and anticipation) has not been made against Applicant's independent claim 34, nor for dependent claims 4-8, 11-14, 19-23, 25-29, and 36-47. Therefore, it is respectfully submitted that each of these claims is patentable over *Cottom* and *Schrader* and that the rejection of these claims should be withdrawn.

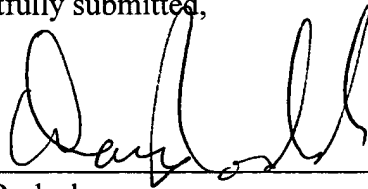
#### **IV. Canceled Claims**

As identified above, claims 16, 31, and 35 have been canceled from the application through this Response without prejudice, waiver, or disclaimer. Applicant reserves the right to present these canceled claims, or variants thereof, in continuing applications to be filed subsequently.

**CONCLUSION**

Applicant respectfully submits that Applicant's pending claims are in condition for allowance. Favorable reconsideration and allowance of the present application and all pending claims are hereby courteously requested. If, in the opinion of the Examiner, a telephonic conference would expedite the examination of this matter, the Examiner is invited to call the undersigned attorney at (770) 933-9500.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Rodack', written over a horizontal line.

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